

1 NICOLA T. HANNA
United States Attorney
2 PATRICK R. FITZGERALD
Assistant United States Attorney
3 Chief, National Security Division
DAVID T. RYAN (Cal. Bar No. 295785)
4 GEORGE E. PENCE (Cal. Bar No. 257595)
Assistant United States Attorneys
5 Terrorism and Export Crimes Section
1500 United States Courthouse
6 312 North Spring Street
Los Angeles, California 90012
7 Telephone: (213) 894-4491/2253
Facsimile: (213) 894-2979
8 E-mail: david.ryan@usdoj.gov
george.pence@usdoj.gov
9

Attorneys for Plaintiff
10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 ROBERT RUNDO,
ROBERT BOMAN,
17 AARON EASON, and
TYLER LAUBE,
18

Defendants.

No. CR 18-00759-CJC

OPPOSITION TO DEFENDANTS' JOINT
MOTION TO DISMISS THE INDICTMENT

Hearing Date: 6/3/2019
Hearing Time: 2:00 P.M.
Location: Courtroom of the
Hon. Cormac J.
Carney

19
20 Plaintiff United States of America, by and through its counsel
21 of record, the United States Attorney for the Central District of
22 California and the undersigned Assistant United States Attorneys,
23 hereby files its Opposition to Defendants' Joint Motion to Dismiss
24 the Indictment.

25 //

26 //

1 This Opposition is based upon the attached memorandum of points
2 and authorities and exhibits, the files and records in this case, and
3 such further evidence and argument as the Court may permit.

4 Dated: May 6, 2019

Respectfully submitted,

5 NICOLA T. HANNA
6 United States Attorney

7 PATRICK R. FITZGERALD
8 Assistant United States Attorney
9 Chief, National Security Division

9 /s/

10 DAVID T. RYAN
11 GEORGE E. PENCE
12 Assistant United States Attorneys

13 Attorneys for Plaintiff
14 UNITED STATES OF AMERICA
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TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. PROCEDURAL AND STATUTORY BACKGROUND.....	2
A. The Indictment.....	2
B. Motion to Dismiss in Related Case.....	3
C. The Anti-Riot Act.....	4
III. FACTUAL BACKGROUND.....	5
IV. ARGUMENT.....	6
A. The Anti-Riot Act is Not Overbroad Under the First Amendment.....	6
B. The Anti-Riot Act is Not Unconstitutionally Vague.....	13
C. Count Two Sufficiently Alleges a Violation of the Anti-Riot Act.....	18
D. The Conspiracy Count Does Not Violate Wharton's Rule.....	21
V. CONCLUSION.....	22

TABLE OF AUTHORITIES

CASES

<u>Ayotte v. Planned Parenthood of Northern New England,</u>	
546 U.S. 320 (2006)	8
<u>Brandenburg v. Ohio,</u>	
395 U.S. 444 (1969)	9, 10
<u>Brundage v. United States,</u>	
365 F.2d 616 (10th Cir. 1966)	15
<u>Elonis v. United States,</u>	
135 S. Ct. 2001 (2015)	9
<u>Hamling v. United States,</u>	
418 U.S. 87 (1974)	18
<u>Hill v. Colorado,</u>	
530 U.S. 703 (2000)	16
<u>Holder v. Humanitarian Law Project,</u>	
561 U.S. 1 (2010)	13
<u>Iannelli v. United States,</u>	
420 U.S. 770 (1975)	22
<u>In re Shead,</u>	
302 F. Supp. 560 (N.D. Cal. 1969)	10, 12
<u>Johnson v. United States,</u>	
135 S. Ct. 2551 (2015)	13, 14
<u>Lovely v. Cunningham,</u>	
796 F.2d 1 (1st Cir. 1986)	15, 17, 21
<u>Members of City Council of Los Angeles v. Taxpayers for Vincent,</u>	
466 U.S. 789 (1984)	12
<u>National Mobilization Committee to End the War in Vietnam v. Foran,</u>	

1	<u>et al.</u> , 411 F.2d 934 (7th Cir. 1969)	7, 8, 11
2	<u>Turner Broadcasting Systems, Inc. v. FCC,</u>	
3	520 U.S. 180 (1997)	6, 13
4	<u>United States v. Berger,</u>	
5	473 F.3d 1080 (9th Cir. 2007)	18
6	<u>United States v. Buckland,</u>	
7	289 F.3d 558 (9th Cir. 2002)	12
8	<u>United States v. Carll,</u>	
9	105 U.S. 611 (1882)	18
10	<u>United States v. Castro,</u>	
11	887 F.2d 988 (9th Cir. 1989)	21
12	<u>United States v. Chenaar,</u>	
13	552 F.2d 294 (9th Cir. 1977)	18
14	<u>United States v. Chi Mak,</u>	
15	683 F.3d 1126 (9th Cir. 2012)	6, 10
16	<u>United States v. Coulter,</u>	
17	474 F.2d 1004 (9th Cir. 1973)	15
18	<u>United States v. Dellinger,</u>	
19	472 F.2d 340 (7th Cir. 1972)	10, 16
20	<u>United States v. Fernandez,</u>	
21	388 F.3d 1199 (9th Cir. 2004)	19
22	<u>United States v. Giese,</u>	
23	597 F.2d 1170 (9th Cir. 1979)	20
24	<u>United States v. Hoffman,</u>	
25	334 F. Supp. 504 (D.D.C. 1971)	11, 12
26	<u>United States v. Jae Gab Kim,</u>	
27	449 F.3d 933 (9th Cir. 2006)	16
28	<u>United States v. Kelly,</u>	

1	874 F.3d 1037 (9th Cir. 2017)	20
2	<u>United States v. McGee,</u>	
3	890 F.3d 730 (8th Cir. 2018)	15
4	<u>United States v. Musacchio,</u>	
5	968 F.2d 782 (9th Cir. 1991)	19
6	<u>United States v. O'Brien,</u>	
7	391 U.S. 367 (1968)	6
8	<u>United States v. Ohlson,</u>	
9	552 F.2d 1347 (9th Cir. 1977)	21
10	<u>United States v. Osinger,</u>	
11	753 F.3d 939 (9th Cir. 2014)	16
12	<u>United States v. Shortt Accountancy Corp.,</u>	
13	785 F.2d 1448 (9th Cir. 1986)	20
14	<u>United States v. Stevens,</u>	
15	559 U.S. 460 (2010)	12
16	<u>United States v. Wardrick,</u>	
17	350 F.3d 446 (4th Cir. 2003)	15
18	<u>United States v. Williams,</u>	
19	553 U.S. 285 (2008)	passim

STATUTES

21	18 U.S.C. § 113(c)	15
22	18 U.S.C. § 2101	10
23	18 U.S.C. § 2101(a)	4, 16
24	18 U.S.C. § 2102(a)	7, 12
25	18 U.S.C. § 2102(a)(2)	5
26	18 U.S.C. § 2102(b)	8, 16
27	18 U.S.C. § 2113(d)	14

RULES

Fed. R. Crim. P. 12(b)(3)(B)..... 20

Federal Rule of Criminal Procedure 7..... 18

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Anti-Riot Act of 1968 expressly prohibits coordinated campaigns of violence such as the government has alleged in the Indictment, and expressly excludes from its coverage non-violent political speech that is protected by the First Amendment. Defendants' planning and participation in riots with the intent to violently assault their perceived enemies plainly runs afoul of the Act. Notwithstanding their protestations to the contrary, defendants are not charged with merely expressing unpopular beliefs. Defendants' First Amendment attacks on the Anti-Riot Act, both facial and as-applied, are therefore meritless.

Due to the Anti-Riot Act's narrow focus on the use of facilities of interstate commerce and interstate travel to prepare for, incite, and engage in violence, courts over the past 50 years have repeatedly and uniformly upheld the Act in the face of the same First Amendment challenges as those recycled here. Indeed, just last week, in a lengthy memorandum opinion, the district court in the Western District of Virginia rejected a nearly identical challenge brought by several of defendants' co-conspirators, who are facing the same charges for the same acts of violence at the same events. That opinion, attached as Exhibit 1, persuasively explains why the challenges raised by defendants here must also fail. That opinion provides exhaustive legal support for rejecting defendants' arguments on the following grounds:

First, the definition of "riot" in the Anti-Riot Act is not facially overbroad because it prohibits only violence, true threats

1 of violence, and the advocacy of violence where such advocacy is
2 directed to inciting or producing imminent lawless action and is
3 likely to produce such action.

4 Second, the Anti-Riot Act is not unconstitutionally vague
5 because its key terms are specifically defined and exclude mere
6 advocacy of ideas or expression of beliefs, and the scope of
7 defendants' violation of the Act is specified in the Indictment.

8 Third, Count Two of the Indictment contains the elements of the
9 offense charged and fairly informs defendants of the charge. No more
10 is required. Even assuming defendants were entitled to more factual
11 specificity, the proper recourse would be to seek a bill of
12 particulars, which defendants have not done and which is not
13 warranted in light of the voluminous discovery already produced.

14 Fourth, Count One of the Indictment does not violate Wharton's
15 Rule because the Anti-Riot Act can be violated absent any concerted
16 criminal activity between two or more persons.

17 Thus, a long and unbroken line of case law, including the recent
18 decision from the Western District of Virginia, confirms that
19 defendants' motion is baseless and should be denied.

20 **II. PROCEDURAL AND STATUTORY BACKGROUND**

21 **A. The Indictment**

22 The Indictment charges defendants with conspiracy in violation
23 of Title 18, United States Code, Section 371, and rioting, in
24 violation of Title 18, United States Code, Sections 2101 and 2(a).
25 The conspiracy count charges that beginning on or about December 2016
26 and continuing until on or about October 2, 2018, defendants
27 conspired and agreed to engage in the crime of rioting. In support
28

1 of that charge, the conspiracy count sets forth 47 overt acts,
2 ranging from December 2016 to October 2, 2018.

3 The rioting count charges that beginning on or about March 27,
4 2017 and continuing until on or about April 15, 2017, defendants,
5 each aiding and abetting the other, used facilities of interstate
6 commerce, including the Internet, telephone, and a Visa credit card,
7 with the intent to incite, organize, promote, encourage, participate
8 in, and carry on a riot and commit an act of violence in furtherance
9 of a riot. The rioting count charges that during and after such uses
10 of facilities of interstate commerce, defendants committed one or
11 more overt acts for the purposes specified above, including traveling
12 together to Berkeley on April 14, 2017, to engage in a riot.

13 **B. Motion to Dismiss in Related Case**

14 On October 10, 2018, a grand jury in the Western District of
15 Virginia returned an Indictment in a related case against four of
16 defendants' co-conspirators from the Rise Above Movement ("RAM"),
17 charging them with conspiracy to riot and rioting in connection with
18 their acts of violence at three of the same events described in the
19 Indictment in this case - Huntington Beach, Berkeley, and
20 Charlottesville. (Ex. 2). On February 1, 2019, the defendants in
21 that case filed a motion to dismiss the Indictment, presenting nearly
22 identical arguments as those raised here.

23 On May 2, 2019, the Honorable Norman K. Moon, United States
24 District Court, Western District of Virginia, issued a 31-page
25 opinion denying the motion, holding that (1) the Anti-Riot Act is not
26 overbroad under the First Amendment; (2) the Anti-Riot Act is not
27 impermissibly vague under the Due Process Clause of the Fifth
28 Amendment; (3) Wharton's Rule does not prohibit charging conspiracy

1 to violate the Anti-Riot Act; and (4) the Indictment adequately set
 2 forth the elements of the Anti-Riot Act and was not required to
 3 include factual details or statutory definitions. (Ex. 1).

4 On April 29 and May 3, 2019, the remaining defendants in that
 5 case pleaded guilty to conspiracy to riot pursuant to plea agreements
 6 in which they admitted that they and other RAM associates trained to
 7 engage in violence at political events, assaulted various people at
 8 the events in Huntington Beach, Berkeley, and Charlottesville, and
 9 traveled to those events "with the intention of provoking physical
 10 conflict with counter-protestors, which they believed would justify
 11 their use of force against the counter-protestors and shield them
 12 from prosecution for their acts of violence." (Ex. 3 at 3-5; Ex. 4
 13 at 3-5; Ex. 5 at 3-5).¹

14 **C. The Anti-Riot Act**

15 The Anti-Riot Act, 18 U.S.C. § 2101(a) provides:

16 Whoever travels in interstate or foreign commerce
 17 or uses any facility of interstate or foreign
 18 commerce, including, but not limited to, the
 19 mail, telegraph, telephone, radio, or television,
 20 with intent (1) to incite a riot; or (2) to
 21 organize, promote, encourage, participate in, or
 22 carry on a riot; or (3) to commit any act of
 23 violence in furtherance of a riot; or (4) to aid
 24 or abet any person in inciting or participating
 25 in or carrying on a riot or committing any act of
 26 violence in furtherance of a riot; and who either
 27 during the course of any such travel or use or
 28 thereafter performs or attempts to perform any
 other overt act for any purpose specified [in
 (1)-(4)] . . . [s]hall be fined . . . or
 imprisoned not more than five years, or both.

Section 2102(a) defines "riot" as follows:

a public disturbance involving (1) an act or acts
 of violence by one or more persons part of an

¹ The fourth defendant in that case pleaded guilty to conspiracy to riot on November 30, 2018, prior to the filing of the motion to dismiss. (Dkts. 57-60, Case No. 3:18-CR-00025-NJM-JCH (W.D. Va.)).

1 assemblage of three or more persons, which act or
2 acts shall constitute a clear and present danger
3 of, or shall result in, damage or injury to the
4 property of any other person or to the person of
5 any other individual or (2) a threat or threats
6 of the commission of an act or acts of violence
7 by one or more persons part of an assemblage of
8 three or more persons having, individually or
9 collectively, the ability of immediate execution
10 of such threat or threats, where the performance
11 of the threatened act or acts of violence would
12 constitute a clear and present danger of, or
13 would result in, damage or injury to the property
14 of any other person or to the person of any other
15 individual.

16 Section 2102(b) provides that the term "to incite a riot" or "to
17 organize, promote, encourage, participate in, or carry on a riot"
18 "includes, but is not limited to":

19 [U]rging or instigating other persons to riot,
20 but shall not be deemed to mean the mere oral or
21 written (1) advocacy of ideas or (2) expression
22 of belief, not involving advocacy of any act or
23 acts of violence or assertion of the rightness
24 of, or the right to commit, any such act or acts.

25 As discussed below, defendants' overbreadth and vagueness
26 challenges are based almost exclusively on 18 U.S.C. § 2102(a)(2),
27 the portion of the definition of "riot" that includes public
28 disturbances involving "threats" of violence. That provision is not
at issue in this case, which is based on riots that involved actual
violence, not merely threats of violence.

29 **III. FACTUAL BACKGROUND**

30 As set forth in the Indictment, throughout 2017, defendants
31 participated in RAM, which represented itself as a combat-ready,
32 militant group of a new nationalist white supremacy and identity
33 movement. Defendants and their co-conspirators used the Internet and
34 text messages to coordinate and participate in hand-to-hand and other
35 combat training to prepare to engage in violence at political

1 rallies. Defendants and their co-conspirators then traveled to
2 rallies in Huntington Beach, Berkeley, and San Bernardino,
3 California, where they assaulted various persons including counter-
4 protestors, journalists, and a police officer. Following each of
5 those events, defendants and their co-conspirators used the Internet
6 and text messages to celebrate their acts of violence at these events
7 and recruit more members for future events.

8 **IV. ARGUMENT**

9 **A. The Anti-Riot Act is Not Overbroad Under the First 10 Amendment**

11 The Anti-Riot Act is not overbroad under the First Amendment.
12 As an initial matter, because the Anti-Riot Act is content-neutral,
13 it is subject to intermediate scrutiny and "will be sustained under
14 the First Amendment if it advances important governmental interests
15 unrelated to the suppression of free speech and does not burden
16 substantially more speech than necessary to further those interests."
17 Turner Broadcasting Systems, Inc. v. FCC, 520 U.S. 180, 189 (1997).
18 See also United States v. Chi Mak, 683 F.3d 1126, 1134-35 (9th Cir.
19 2012) (applying intermediate scrutiny to statute that prohibits
20 expressive conduct "without regard to content or viewpoint"); United
21 States v. O'Brien, 391 U.S. 367, 376 (1968) ("[W]hen speech and
22 nonspeech elements are combined in the same course of conduct, a
23 sufficiently important governmental interest in regulating the
24 nonspeech element can justify incidental limitations on First
25 Amendment freedoms.").

26 The Anti-Riot Act serves an important governmental interest in
27 preventing public disturbances, in particular those involving
28 interstate travel or the use of facilities of interstate commerce.

1 See Ex. 1 at 16 ("The Court finds that § 2101 materially advances
2 Congress's substantial interest in keeping the channels of interstate
3 commerce free from immoral and injurious uses, namely uses that
4 facilitate riotous disturbances involving violence or threats of
5 violence backed up by immediate execution.") (quotation marks
6 omitted); National Mobilization Committee to End the War in Vietnam
7 v. Foran et al., 411 F.2d 934, 939 (7th Cir. 1969) ("[T]he federal
8 government has a strong interest in preventing violence to persons
9 and injury to their property, and when clear and present danger of
10 riot appears, the power of Congress to punish is obvious.")

11 Furthermore, the Anti-Riot Act is narrowly tailored to serve
12 that interest because, as discussed below, it applies only to
13 (1) interstate travel or use of a facility of interstate commerce,
14 (2) with intent to undertake acts of violence in furtherance of a
15 riot or to incite or instigate a riot, (3) followed by overt acts
16 committed with the same intent and for the same purpose. (Ex. 1 at
17 16). Defendants, like numerous unsuccessful challengers before them,
18 seek to construe the statute more broadly by ignoring several of its
19 key provisions.

20 Defendants first contend that the Anti-Riot Act "impermissibly
21 infringes on the freedom of assembly" because it "equates organized
22 assemblies with organized violence," and fails to distinguish between
23 "lawful advocacy and unlawful incitement." (Motion at 7, 8). That
24 is incorrect. On its face, the Anti-Riot Act applies not to all
25 "organized assemblies," but only to "public disturbances" involving
26 "acts of violence" or threats of violence "by a person having the
27 ability of immediate execution of such threats." 18 U.S.C.
28 § 2102(a). See Ex. 1 at 17 ("The Court finds no merit in Defendants'

1 contention that § 2101 'equates organized assemblies with organized
2 violence' or impermissibly chills expressive conduct by 'endorsing
3 the prosecution of political protest.' The Act does not criminalize
4 peaceful protest or lawful assembly but rather targets 'public
5 disturbances involving' violence or the threat of such violence
6 undergirded by the 'ability of immediate execution.'") And on its
7 face, the Anti-Riot Act prohibits prosecution based on "lawful
8 advocacy," stating that it does not apply to mere "advocacy of ideas"
9 or "expression of belief." 18 U.S.C. § 2102(b); Foran, 411 F.2d at
10 938 ("The statute expressly excludes oral or written advocacy of
11 ideas or expressions of belief not involving violence.").

12 Defendants next contend that the Anti-Riot Act is overbroad
13 because it applies to conduct in furtherance of public disturbances
14 involving not only violence but also "the mere *threat* of an act of
15 violence," even if the harm is not imminent. (Mot. at 8-9 (emphasis
16 in original)). As an initial matter, even if the Court were to
17 construe certain provisions of the Anti-Riot Act as overbroad in
18 their possible application to mere advocacy or threats of violence,
19 the Court should still deny the motion because this case does not
20 rely on those provisions. Ayotte v. Planned Parenthood of Northern
21 New England, 546 U.S. 320, 328-29 (2006) ("Generally speaking, when
22 confronting a constitutional flaw in a statute, we try to limit the
23 solution to the problem. We prefer, for example, to enjoin only the
24 unconstitutional applications of a statute while leaving other
25 applications in force, or to sever its problematic portions while
26 leaving the remainder intact."). The defendants in this case are not
27 charged merely with advocating that others engage in violence, or
28 furthering threats of violence; they are charged with personally

1 preparing to engage in violent riots and violently assaulting people
2 at those riots.

3 In any event, the argument is meritless. It is well established
4 that true threats of violence are unlawful and not protected by the
5 First Amendment, regardless of whether the person making the threat
6 has the ability to execute the threat. See Elonis v. United States,
7 135 S. Ct. 2001, 2012 (2015) (holding that "[i]t is settled that the
8 Constitution does not protect true threats," and where a statute
9 requires a defendant transmit a communication for the purpose of
10 issuing a threat or with knowledge that the communication will be
11 viewed as a threat, "it is not necessary to consider any First
12 Amendment issues"). Just as it is unlawful to make a true threat, so
13 is it unlawful to induce such a threat. United States v. Williams,
14 553 U.S. 285, 298 (2008) ("Many long established criminal
15 proscriptions—such as laws against conspiracy, incitement, and
16 solicitation—criminalize speech . . . that is intended to induce or
17 commence illegal activities."). Such acts criminalizing "proposal[s]
18 to engage in illegal activity . . . fall[] well within constitutional
19 bounds." Id. at 299-300.

20 Furthermore, the statute here complies with Brandenburg v. Ohio,
21 395 U.S. 444, 448 (1969), because it applies to the making or
22 inducing not of all threats, but only those threats that create an
23 immediate, clear and present danger. The statute defines a "riot" as
24 a "public disturbance involving" either acts of violence constituting
25 a "clear and present danger" to people or property or "threats" of
26 such violence by individuals "having the ability of immediate
27 execution of such threats," where the performance of the threatened
28 acts "would constitute a clear and present danger" to people or

1 property." See Ex. 1 at 20; In re Shead, 302 F. Supp. 560, 566 (N.D.
2 Cal. 1969). Because the public disturbances urged or instigated
3 under the statute must "constitute a clear and present danger, the
4 overt acts themselves which are committed for that purpose,
5 necessarily must also constitute a clear and present danger." Ex. 1
6 at 20 (quoting In re Shead, 302 F. Supp. at 566). Accordingly, "the
7 conduct condemned by 18 U.S.C. § 2101 is sufficiently limited to
8 advocacy of the use of force or of law violation where such advocacy
9 is directed to inciting or producing imminent lawless action and is
10 likely to incite or produce such action." Id. (citing Brandenburg,
11 395 U.S. at 448); United States v. Dellinger, 472 F.2d 340, 361-62
12 (7th Cir. 1972) (holding that the overt acts required by the statute
13 create an "adequate relation between expression and action" under the
14 First Amendment).

15 Because the definition of "riot" in the Anti-Riot Act
16 specifically "carve[s] out" the sort of advocacy or expression that
17 is protected under the First Amendment, and covers only to public
18 disturbances involving violence or threats of violence that
19 constitute a clear and present danger, it is not overbroad. See Chi
20 Mak, 683 F.3d at 1136 (rejecting First Amendment overbreadth
21 challenge to the Arms Export Control Act and the International
22 Traffic in Arms Regulations which "specifically carve out exceptions
23 to the law for the types of information that are subject to the
24 highest levels of First Amendment protection").

25 Furthermore, defendants are incorrect that there is an
26 attenuation between the travel or use of facilities of interstate
27 commerce with riotous intent and the subsequent overt act. The
28 statute requires that a defendant act with the riotous intent both at

1 the time of the interstate travel or use of facility of interstate
2 commerce, and again when committing an overt act in furtherance of
3 the riot. United States v. Hoffman, 334 F. Supp. 504, 509 (D.D.C.
4 1971) (holding that the Anti-Riot Act does not "authoriz[e]
5 conviction where the unlawful intent and the prohibited act do not
6 coincide").

7 Defendants next contend that the Anti-Riot Act chills speech
8 because a speaker who utters "inflammatory words" can be liable for
9 "a potential listener's reaction," whether the listener is a
10 supporter of the speaker or an opponent, imposing a "heckler's veto"
11 on unpopular speech. (Mot. at 11-12). Defendants are wrong. The
12 statute cannot be applied in such a circumstance because, again, it
13 requires that a defendant act with the specific intent to incite or
14 promote a riot. The Seventh Circuit has directly rejected this exact
15 argument:

16 Plaintiffs' arguments based on guilt by
17 association, loss of control over a theretofore
18 peaceful assembly, and strict liability for the
19 acts of anyone joining an intended peaceful
20 demonstration simply fail to take account of the
21 language of the statute. The statute does
22 interdict riot-connected overt acts, but only if
23 the prescribed intent is present when the
interstate travel or use of interstate facilities
occurs. Thus the intent to engage in one of the
prohibited overt acts is a personal prerequisite
to punishment under this provision and
necessarily renders any challenge based on
innocent intent or unexpected result wide of the
mark.

24 Foran, 411 F.2d at 938.

25 Courts have uniformly and repeatedly construed the Anti-Riot Act
26 narrowly to include these specific requirements of unlawful intent
27 and action. Even assuming the statute could fairly be construed more
28 broadly, as defendants propose, the well-established canon of

1 constitutional avoidance counsels against such a construction. See
 2 United States v. Buckland, 289 F.3d 558, 564 (9th Cir. 2002) ("The
 3 Supreme Court instructs us that 'every reasonable construction must
 4 be resorted to, in order to save a statute from unconstitutionality,"
 5 and where an "otherwise acceptable construction of a statute would
 6 raise serious constitutional problems, and where an alternative
 7 interpretation of the statute is fairly possible, we are obligated to
 8 construe the statute to avoid such problems.").

9 Properly construed, the Anti-Riot Act's intent and action
 10 requirements prevent the statute from capturing a "substantial amount
 11 of protected speech" and running afoul of the First Amendment.
 12 Williams, 553 U.S. at 292.² See In re Shead, 302 F. Supp. at 565
 13 ("In summary, Congress has made it a crime if there is an intent to
 14 promote a riot at the time of use of interstate or foreign facilities
 15 and at that time or thereafter, the additionally-required overt acts
 16 are committed. This intent must be to promote, and the overt acts
 17 must be committed for the purpose of promoting, the disturbances
 18 defined in 18 U.S.C. § 2102(a)"); Ex. 1 at 15 ("Under this
 19 construction, § 2101 only regulates either violence committed in
 20 furtherance of a riot or the unprotected incitement or instigation of
 21 a riot."); Hoffman, 334 F. Supp. at 509 (same). The Anti-Riot Act
 22 advances important governmental interests unrelated to the
 23

24 ² To the extent the Anti-Riot Act could capture one of the
 25 hypothetical scenario defendants suggest, "in determining whether a
 26 statute's overbreadth is substantial, [courts] consider a statute's
 27 application to real-world conduct, not fanciful hypotheticals."
 28 United States v. Stevens, 559 U.S. 460, 487 (2010). The "mere fact
 that one can conceive of some impermissible applications of a statute
 is not sufficient to render it susceptible to an overbreadth
 challenge." Williams, 553 U.S. at 303 (quoting Members of City
 Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800
 (1984)).

1 suppression of free speech and does not burden substantially more
2 speech than necessary to further those interests, and must be
3 sustained under the First Amendment. Turner Broadcasting Systems,
4 520 U.S. at 189.

5 **B. The Anti-Riot Act is Not Unconstitutionally Vague**

6 The Anti-Riot Act is not unconstitutionally vague because its
7 key terms are specifically defined and exclude mere advocacy of ideas
8 or expression of beliefs, and the scope of defendants' violation of
9 the Act is specified in the Indictment.

10 A criminal statute is void for vagueness under the Fifth
11 Amendment if "it fails to give ordinary people fair notice of the
12 conduct it punishes, or [is] so standardless that it invites
13 arbitrary enforcement." Johnson v. United States, 135 S. Ct. 2551,
14 2556 (2015). While a "more stringent vagueness test should apply"
15 when a statute "interferes with the right of free speech or of
16 association," "perfect clarity and precise guidance have never been
17 required even of regulations that restrict expressive activity."
18 Holder v. Humanitarian Law Project, 561 U.S. 1, 19 (2010).

19 Defendants argue that the term "riot" under the statute is vague
20 because to determine whether a public disturbance involves a threat
21 of violence that can be immediately executed requires an "abstract
22 assessment" of the ability of the person making the threat to carry
23 it out. (Mot. at 14-15). As an initial matter, defendants'
24 challenge to the "threats" provision of the statute is inapplicable
25 to this case, because they are charged for their roles in riots that
26 involved actual violence, not merely threats of violence. See
27 Humanitarian Law Project, 561 U.S. at 18-19 ("We consider whether a
28 statute is vague as applied to the particular facts at issue, for a

1 plaintiff who engages in some conduct that is clearly proscribed
2 cannot complain of the vagueness of the law as applied to the conduct
3 of others.")

4 In any event, Judge Moon rejected the identical facial
5 challenge, reasoning:

6 A criminal statute is not void for vagueness
7 simply because it 'call[s] for the application of
8 a qualitative standard . . . to real-world
9 conduct; the law is full of instances where a
10 man's fate depends on his estimating rightly
11 . . . some matter of degree. Johnson, 135 S. Ct.
12 at 2562. Moreover, the Court cannot say that
13 whether a 'public disturbance' involves a
14 'threat' of an 'act or acts of violence'
15 fortified by 'the ability of immediate execution'
16 calls for 'wholly subjective judgments without
17 statutory definitions, narrowing context, or
18 settled legal meanings.' Williams, 553 U.S. at
19 306. Indeed, § 2102(a)(2) is itself a statutory
20 definition refining the term 'riot,' and both
21 'riot,' and 'threat' have settled legal meanings.

22 Ex. 1 at 9.

23 As Judge Moon noted, Black's Law Dictionary's definition of
24 "riot" generally tracks that set forth in the Anti-Riot Act: "(1) An
25 assemblage of three or more persons in a public place taking
26 concerted action in a turbulent and disorderly manner for a common
27 purpose . . ." and (2) "An unknown disturbance of the peace by an
28 assemblage of usu. Three or more persons acting with a common
29 purpose in a violent or tumultuous manner that threatens or
30 terrorizes the public or an institution." Id. at n.6 (quoting *Riot*,
31 Black's Law Dictionary (10th ed. 2014)).

32 Furthermore, numerous federal and state criminal laws require
33 proof that an individual had the ability to carry out a threat. The
34 federal bank robbery statute, 18 U.S.C. § 2113(d), prohibits
35 committing an "assault" in commission of a bank robbery, which courts

1 have defined to require "an intent to, and in fact generating a
2 reasonable apprehension in a victim plus a threat or attempt to
3 inflict bodily harm coupled with the present ability to commit
4 violent injury upon the person of another." United States v.
5 Coulter, 474 F.2d 1004, 1005 (9th Cir. 1973) (emphasis added).
6 Similarly, the federal crime of assault with a dangerous weapon, 18
7 U.S.C. § 113(c), has been defined to include an "attempt coupled with
8 the present ability to commit a violent injury upon the person of
9 another." Brundage v. United States, 365 F.2d 616, 618 (10th Cir.
10 1966). Examples of similar state statutes abound. See, e.g., United
11 States v. McGee, 890 F.3d 730, 735 (8th Cir. 2018) (Iowa statute
12 defining assault as acts intended to place another in fear of
13 immediate harmful contact "coupled with the apparent ability to
14 execute the act"); United States v. Wardrick, 350 F.3d 446, 455 (4th
15 Cir. 2003) (Maryland statute defining assault as a "threat by words
16 or acts or both to do bodily harm to another, coupled with the
17 apparent present ability to carry out the threat"); Lovely v.
18 Cunningham, 796 F.2d 1, 3-4 (1st Cir. 1986) (New Hampshire statute
19 defining sexual assault to include coercing sexual activity through
20 threats coupled with apparent "ability to execute these threats in
21 the future"). The definition of "riot" in this case adopts well-
22 established and familiar legal standards and concepts and is not
23 vague.

24 Likewise, the terms "to incite a riot" and to "organize,
25 promote, encourage, participate in, or carry on a riot" do not call
26 for "wholly subjective judgments without statutory definitions,
27 narrowing context, or settled legal meanings." Williams, 553 U.S. at
28 306. On the contrary, the statute specifically defines the terms as

1 including "urging or instigating other persons to riot," and
2 excluding mere "advocacy of ideas" or "expression of belief . . ."
3 18 U.S.C. § 2102(b). As the Seventh Circuit held in Dellinger, the
4 term "urge" has a settled legal meaning: "[n]early all definitions
5 suggest an impelling beyond mere persuasion, and it is said that
6 'URGE indicates a pressing, impelling, seeking to influence, or
7 overcoming some obstacle, check, or drawback to a certain course."
8 472 F.2d at 362 (quoting Webster's Third New International Dictionary
9 (1961)). Furthermore, the Seventh Circuit explained, all of the acts
10 proscribed in 18 U.S.C. § 2101(a) "embody a relation to action in
11 that they logically appear to require that the riot occur" or
12 "require the element of propelling the action." Dellinger, 472 F.2d
13 at 361. "Many long established criminal proscriptions—such as laws
14 against conspiracy, incitement, and solicitation—criminalize speech .
15 . . . that is intended to induce or commence illegal activities."
16 Williams, 553 U.S. at 298. Such acts criminalizing "proposal[s] to
17 engage in illegal activity . . . fall[] well within constitutional
18 bounds." Id. at 299-300.

19 Finally, all of these specifically defined terms in the Anti-
20 Riot Act are further narrowed by the statute's "intent" requirement.
21 In Hill v. Colorado, 530 U.S. 703, 732 (2000), the Supreme Court
22 rejected a vagueness challenge because the challenged statute
23 contained a scienter requirement of "knowingly" and because the
24 statute contained "common words" understandable by people of ordinary
25 intelligence. "[A] scienter requirement may mitigate a law's
26 vagueness, especially with respect to the adequacy of notice to the
27 complainant that his conduct is proscribed." United States v. Jae
28 Gab Kim, 449 F.3d 933, 943 (9th Cir. 2006); see also United States v.

1 Osinger, 753 F.3d 939, 945 (9th Cir. 2014) (scienter requirement
2 undermined defendant's contention that he was unable to discern that
3 his conduct was prohibited by the statute). Here, as in Hill, the
4 statute's intent requirement, which requires intent both with respect
5 to the interstate commerce element and the overt act, alleviates any
6 concern that defendants are being punished for behavior they could
7 not have known was illegal.

8 With respect to defendants' as-applied challenge, defendants
9 here are charged not with making speeches or inciting others to riot,
10 but with rioting themselves. As the Indictment sets forth,
11 defendants used facilities of interstate commerce—including text
12 messages, the Internet, and a credit card—to recruit, train, and
13 travel to political events with the shared intent of beating up their
14 political opponents. (Dkt. 47 ¶¶ 7-10). Defendants then did exactly
15 that, by their own admission, jumping over barriers (id. at 12),
16 "smashing commies," (id. at 11), and recruiting others to join "the
17 only alt right crew that actually beats antifa senseless and wins
18 rallies" (id. at 11).³ The statute is not vague as applied to
19 defendants.
20
21

22 ³ Defendants argue that the Overt Acts set forth in the
23 Conspiracy count in the Indictment that include statements by
24 defendants and co-conspirators after the riots cannot constitute use
25 of facilities of interstate commerce in furtherance of a riot, and
26 therefore evidence the government's "uncertainty" regarding the scope
27 of the statute. (Mot. 17-18). That argument is meritless. The
28 post-riot statements to which defendants refer are set forth as Overt
Acts. An act need not itself establish an element of the underlying
offense in order to constitute an overt act in furtherance of a
conspiracy. Here, defendants' post-riot statements and actions set
forth in the conspiracy count constitute overt acts in furtherance of
their ongoing agreement to engage in riots to beat up their political
opponents.

1 **C. Count Two Sufficiently Alleges a Violation of the Anti-Riot**
 2 **Act**

3 Count Two adequately alleges that defendants violated the Anti-
 4 Riot Act. Under Federal Rule of Criminal Procedure 7, an Indictment
 5 is sufficient if it "contains the elements of the offense charged and
 6 fairly informs a defendant of the charge against which he must
 7 defend, and, second, enables him to plead an acquittal or conviction
 8 in bar of future prosecutions for the same offense." Hamling v.
 9 United States, 418 U.S. 87, 117 (1974). "It is generally sufficient
 10 that an indictment set forth the offense in the words of the statute
 11 itself, as long as 'those words of themselves fully, directly, and
 12 expressly, without any uncertainty or ambiguity, set forth all the
 13 elements necessary to constitute the offence intended to be
 14 punished." United States v. Chenaour, 552 F.2d 294, 301 (9th Cir.
 15 1977) (quoting United States v. Carll, 105 U.S. 611, 612 (1882)). An
 16 Indictment does not need to set forth the "manner and means employed"
 17 to commit the offense. Id. "An indictment should be read in its
 18 entirety, construed according to common sense, and interpreted to
 19 include facts which are necessarily implied." United States v.
 20 Berger, 473 F.3d 1080, 1097 (9th Cir. 2007).

21 Defendants' argument that Count Two fails to allege an
 22 interstate commerce nexus or the requisite intent is without merit.
 23 Count Two expressly alleges both elements, stating that between on or
 24 about March 27, 2017 and April 15, 2017, defendants, "each aiding and
 25 abetting the other, used facilities of interstate commerce, including
 26 but not limited to the Internet, telephone, and a Visa credit card
 27 with account number ending in 0807, with intent to incite, organize,
 28 promote, encourage, participate in, and carry on a riot, and to

1 commit an act of violence in furtherance of a riot, and to aid or
2 abet any person in inciting and participating in and carrying on a
3 riot and committing any act of violence in furtherance of a riot,"
4 and during and after such use, defendants "committed one or more
5 overt acts for one or more of the purposes specified above, including
6 traveling together on or about April 14, 2017, to Berkeley,
7 California, to engage in a riot." (Dkt. 47 ¶ 9) (Emphasis added).
8 The Indictment thus expressly alleges both that defendants used
9 facilities of interstate commerce with the intent to riot, and that
10 they subsequently committed an overt act to engage in a riot.

11 Defendants' argument appears to be that although Count Two
12 clearly alleges the elements of the offense, it does not set forth
13 specific examples of the manner and means by which each defendant
14 committed each of the elements of the offense. But that is not what
15 the law requires. See United States v. Fernandez, 388 F.3d 1199,
16 1218 (9th Cir. 2004) ("We have previously held, in the context of
17 Hobbs Act prosecutions, that an indictment need not set forth facts
18 alleging how interstate commerce was affected, nor otherwise state
19 any theory of interstate impact. The rationale of these cases is
20 equally applicable to the interstate nexus requirement in the RICO
21 statute."); United States v. Musacchio, 968 F.2d 782, 786 (9th Cir.
22 1991) ("[T]he government was not required to allege its theory of the
23 case or list supporting evidence to prove the crime alleged.")
24 Defendants do not and cannot dispute that Count Two sets forth all
25 elements necessary to constitute the offense, including the use of
26 facilities of interstate commerce.

27 Defendants' claim that certain evidence would be insufficient
28 under the Commerce Clause cannot be determined on a motion to

1 dismiss. Federal Rule of Criminal Procedure allows a defendant to
2 file a pretrial motion to dismiss an indictment if the motion "can be
3 determined without a trial on the merits." Fed. R. Crim. P.
4 12(b)(3)(B). "A motion to dismiss is generally capable of
5 determination before trial if it involves questions of law rather
6 than fact." United States v. Kelly, 874 F.3d 1037, 1046 (9th Cir.
7 2017) (quotation omitted). "If the pretrial claim is 'substantially
8 founded upon and intertwined with' evidence concerning the alleged
9 offense, the motion falls within the province of the ultimate finder
10 of fact and must be deferred." United States v. Shortt Accountancy
11 Corp., 785 F.2d 1448, 1452 (9th Cir. 1986) (citation omitted).

12 Finally, even assuming defendants were entitled to additional
13 factual specificity, the proper recourse would have been not to seek
14 dismissal of the well-pleaded Indictment, but to seek a bill of
15 particulars, which defendants did not do. United States v. Giese,
16 597 F.2d 1170, 1180 (9th Cir. 1979) (setting forth bases for
17 providing bill of particulars). Nonetheless, because the voluminous
18 discovery in this case contains abundant examples of defendants' use
19 of social media, text messages, encrypted messaging services, and
20 credit and debit cards to train, recruit, prepare for, and travel to
21 the riot on April 15, 2017, defendants have been more than adequately
22 advised of the numerous ways in which their conduct satisfied the
23 elements of Count Two. See Giese, 597 F.2d at 1180 (affirming denial
24 of request for bill of particulars where "the government provided
25 appellant with a large volume of information . . . which revealed the
26 government's theory of the case," and holding that "[f]ull discovery
27 also obviates the need for a bill of particulars").

1 **D. The Conspiracy Count Does Not Violate Wharton's Rule**

2 Wharton's Rule does not preclude charging a conspiracy to
3 violate the Anti-Riot Act. Wharton's Rule states that "an agreement
4 by two persons to commit a particular crime cannot be prosecuted as a
5 conspiracy when the crime is of such a nature as necessarily to
6 require the participation of two persons for its commission." United
7 States v. Ohlson, 552 F.2d 1347, 1348 (9th Cir. 1977). As Judge Moon
8 held, defendants' challenge under Wharton's Rule is "baseless" for
9 three reasons. Ex. 1 at 29.

10 First, the Anti-Riot Act can be violated by one person.
11 Although more than one person must be present at a public event in
12 order for a riot to exist, "the underlying crime of traveling [or
13 using facilities of interstate commerce] with the requisite intent
14 followed by an overt act in furtherance of a riot can plainly be
15 committed by a single person." Id. at 30.

16 Second, Wharton's Rule is aimed at crimes, such as bigamy or
17 adultery, in which "[t]he parties to the agreement are the only
18 persons participating in the substantive offense, the immediate
19 consequences of the crime rest solely on the participants, and the
20 agreement constituting the substantive offense is unlikely to pose
21 any threat to society which conspiracy laws are intended to prevent,
22 such as a continuing pattern of criminal conduct." United States v.
23 Castro, 887 F.2d 988, 996 (9th Cir. 1989). Here, unlike crimes such
24 as bigamy or adultery, the consequences of violating the Anti-Riot
25 Act fall on society, rather than on defendants only. Ex. 1 at 30.

26 Third, the "third-party exception" to Wharton's Rule renders the
27 rule "inapplicable when the conspiracy involves the cooperation of a
28 greater number of persons than is required for the commission of the

substantive offense." Iannelli v. United States, 420 U.S. 770, 776 (1975). Here, the charged conspiracy involved, at least, the four defendants, two additional co-conspirators identified in the Indictment, and the remaining defendants who have pleaded guilty for their roles in the conspiracy in the Western District of Virginia. Therefore, even assuming defendants' mistaken premise that the underlying crime requires three participants, the third-party exception would render Wharton's Rule inapplicable. Wharton's Rule does not preclude the charge of conspiracy to violate the Anti-Riot Act.

V. CONCLUSION

For the foregoing reasons, defendants' Joint Motion to Dismiss the Indictment should be denied.

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Respectfully submitted,

NICOLA T. HANNA
United States Attorney

PATRICK R. FITZGERALD
Assistant United States Attorney
Chief, National Security Division

/s/

DAVID T. RYAN
GEORGE E. PENCE
Assistant United States Attorneys

Attorneys for Plaintiff
UNITED STATES OF AMERICA